
The incoherence of strong popular sovereignty

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This paper argues that the strong conception of popular sovereignty employed in the German Federal Constitutional Court's recent decision on the Treaty of Lisbon is incoherent and should not be used as the centerpiece of a democratic constitutional theory. Strong conceptions of popular sovereignty are usually defended on the basis of the claim that an appeal to strong popular sovereignty is necessary to ground the legitimacy of constitutional law. In fact, strong conceptions of popular sovereignty eliminate the conceptual space for the idea of legitimate law. This thesis is developed through a critical discussion of Carl Schmitt's constitutional theory—which appears to be the main inspiration behind contemporary arguments for strong popular sovereignty—as well as through an analysis of the Lisbon decision of the Bundesverfassungsgericht.

1. Introduction

In its recent decision on the constitutionality of the Treaty of Lisbon, the German Federal Constitutional Court (Bundesverfassungsgericht) relies heavily on a strong conception of popular sovereignty that understands the popular sovereign as a constituent power prior to law. Though the Court upheld the constitutionality of the treaty, it pointed out that, in its view, the principle of democracy puts absolute limits on the permissible extent of European integration. To establish this claim, the Court argues that strong popular sovereignty is essential to democracy, and that the preservation of democracy in Germany requires that the German people not be deprived of their metalegal constituent power through acts of the constituted powers. Because the Grundgesetz undoubtedly shields the principle of democracy from amendment, the Court feels entitled to conclude that it would be unconstitutional for constituted powers claiming to act under the existing German Constitution to participate in the

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project of turning the EU into a federal state endowed with the power to determine the scope of its own competence, since to do so would infringe upon the constituent power of the German people.

The aim of this article is to offer a critical analysis of the conception of strong popular sovereignty that is used in the *Lisbon* decision, and to ask whether that conception offers a convincing theory of constitutional legitimacy for a democratic state. I will argue that a democratic constitutional theory ought not to be based on a notion of strong popular sovereignty, and that the claim that strong popular sovereignty is essential to democracy ought to be rejected.

Let me begin by giving a preliminary account of what I understand by strong popular sovereignty. According to the defenders of strong popular sovereignty, a written constitution is itself legitimate, and thus has the power to legitimate ordinary laws enacted in accordance with its rules and constraints, if and only if it has been created by a constitution-giving act on the part of the people as constituent power and continues to enjoy the people's tacit support. The people as constituent power is taken to exist prior to and apart from all law, including constitutional law, and is taken to have the right to give itself whatever constitution it pleases. All constituted powers are held to be subject to and to be limited by the constitutional choice of the people, while the people is taken to retain the power to give itself a new and different constitution, through a renewed exercise of constituent power, if it sees fit.

Conceptions of strong popular sovereignty contrast with weaker notions of popular sovereignty. The latter either understand popular sovereignty to be immanent in a framework of constitutional rules that makes political leadership elective and gives equal rights of democratic participation to all citizens,¹ or they hold that the creation of a new constitution is, at the same time, an act of self-constitution of a new people.² Popular sovereignty, in the first of these weak conceptions, is simply another name for well-ordered democratic government, since the will of the people is identified with the outcomes of a democratic process governed by constitutional law. In this conception, there can be no people prior to or apart from constitutional law, and all talk of the people as the historical author of the constitution is taken to be a fiction without normative relevance.³ The second, weaker conception of popular sovereignty attempts to make more room for the idea that the people can, in a normatively relevant sense,

¹ Kant describes the state as “a union of a multitude of human beings under laws of right” and reserves the term “sovereignty” for the legislative power in the state which “can belong only to the united will of the people.” See Immanuel Kant, *The Metaphysics of Morals*, in IMMANUEL KANT, PRACTICAL PHILOSOPHY 353, 456–457 (Mary J. Gregor ed. & trans., 1996). For contemporary proponents, see JOHN RAWLS, POLITICAL LIBERALISM 271–278 (1996); JÜRGEN HABERMAS, BETWEEN FACTS AND NORMS: CONTRIBUTIONS TO A DISCOURSE THEORY OF LAW AND DEMOCRACY 82–131 (William Rehg trans., 1998).

² In Rousseau's words, the process of democratic constitution making is “the act by which a people becomes a people”; see JEAN-JACQUES ROUSSEAU, THE SOCIAL CONTRACT AND THE FIRST AND SECOND DISCOURSES 162 (Susan Dunn ed., 2002). See also HANNAH ARENDT, ON REVOLUTION (1990); AKHIL REED AMAR, AMERICA'S CONSTITUTION: A BIOGRAPHY 3–53 (2005). In Bruce Ackerman's work, the view is combined with the claim that there is a need for periodic constitutional renewal through “higher lawmaking” that more directly engages the people than ordinary lawmaking. See BRUCE ACKERMAN, WE THE PEOPLE: FOUNDATIONS (1993).

³ See HANS Kelsen, VOM WESEN UND WERT DER DEMOKRATIE [ON THE NATURE AND VALUE OF DEMOCRACY] 14–25 (1929).

be regarded as the historical author of the constitution. It holds that any truly democratic constitution originates from a revolutionary moment of new constitutional beginning that constitutes a new political nation, and it argues that the present constitution, if it is to be legitimate, must keep alive and develop the promise of freedom made in the beginning. However, since the view ties the existence of a people, as a political association, to the continuity of its constitution, it has no room for the idea that the popular sovereign can choose at will to abrogate the existing constitution and give itself a completely new constitution while, nevertheless, retaining its political existence and identity.

Proponents of strong popular sovereignty believe that the weaker conceptions miss a crucial element of constitutional legitimacy. For a people to live democratically, they argue, it is not enough for it to be governed by a system of rules that gives equal rights of political participation to all citizens and that can be traced back to a revolutionary moment of democratic self-constitution in the past. According to proponents of strong popular sovereignty, the very existence of a people as a political community is tied inseparably to a particular political identity that is prior to all law, including constitutional law. A positive constitution, therefore, can be legitimate—and give legitimacy to the ordinary laws enacted in accordance with its rules and constraints—only if and only for as long as it expresses adequately that particular identity in a concrete institutional form. And to enjoy genuine self-determination, the people, as constituent power above all law, must always remain the sovereign judge of whether this is indeed the case. Any conception of popular sovereignty, therefore, that takes the existence of the people as a political community to be bound to a particular positive constitution or a particular normative framework should consequently be rejected, for the reason that any constitution based on or interpreted through such a conception of popular sovereignty will thwart a people's democratic self-determination and thus be illegitimate.

I will argue that strong popular sovereignty is an incoherent notion. Strong popular sovereignty purports to offer an account of what makes law legitimate, and its attractiveness depends, to a large extent, on the fact that it appears to offer an appealing account. But in truth, strong popular sovereignty necessarily fails to ground the legitimacy of law, since the conception of sovereignty involved in strong popular sovereignty implies, really, that there can be no legitimate law.

The reason for this, in a nutshell, is that the function of legitimate law is to reconcile us to the heteronomy that we inevitably suffer in political community, where people who differ in their values, preferences, and opinions must somehow take collective decisions that can never fully satisfy all. However, proponents of strong popular sovereignty, if push comes to shove, reject the political project of reconciliation of difference through legitimate law in favor of the idea that laws are only justified as long as they faithfully express an antecedent shared identity. However, if we agree what is to be done because we already share a thick, value-laden identity we do not need to appeal to legitimacy. And if we do not share such an identity, then a conception of strong popular sovereignty will imply that there is no legitimate way for us to live together under common laws.

The argument of the paper will be developed in two stages. In a first step, I will present a general argument for the incoherence of strong popular sovereignty based on a critical discussion of Carl Schmitt's constitutional theory. Though strong popular sovereignty may not have originated with Schmitt,⁴ he certainly presented the most sophisticated and influential statement of the view, and he is clearly the major inspiration for contemporary proponents of strong popular sovereignty.⁵ Therefore, it seems appropriate to use his views as the target against which to mount the general challenge to strong popular sovereignty. In the second half of the paper, I will return to the verdict of the Bundesverfassungsgericht on the constitutionality of the Treaty of Lisbon.⁶ I will show that the reasoning of the Federal Constitutional Court relies on a notion of strong popular sovereignty akin to Schmitt's, and I will go on to argue that the Court's argument is undermined by the incoherence of strong popular sovereignty. By way of conclusion, I will offer a brief defense of the view that the principle of democracy, rightly understood, does not put any absolute limits on the justifiability of continuing European integration.

2. The incoherence of popular sovereignty in Schmitt

The appeal of strong popular sovereignty rests largely on the fact that it appears to offer an attractive account of what makes law legitimate. Carl Schmitt's presentation of strong popular sovereignty is a clear case in point.⁷ Schmitt tries to defend strong popular sovereignty by arguing that those who deny it will inevitably lack the resources to explain how law can be legitimate. This claim is central to Schmitt's well-known polemic against Hans Kelsen's *Pure Theory of Law*.⁸

The *Pure Theory of Law* denies that the concept of constituent power is a legally meaningful concept. Kelsen holds that it is impossible for human beings to enact law without having been legally authorized to do so by an already existing basic norm or by other norms derived from a basic norm. The law, according to Kelsen, necessarily starts with a basic norm, not with a metalegal yet authoritative political will, and it

⁴ Schmitt himself, though perhaps wrongly, sources the view to Sieyès. See Emmanuel-Joseph Sieyès, *Qu'est-ce que le Tiers État? [What is the Third Estate?]*, in EMMANUEL-JOSEPH SIEYÈS, *ÉCRITS POLITIQUES* [POLITICAL WRITINGS] 115, 158–169 (Roberto Zapperi ed., 1994). Sieyès likely understood the will of the people to be bound to standards of natural law, a restriction that Schmitt would reject.

⁵ See CARL SCHMITT, *CONSTITUTIONAL THEORY* 59–166 (Jeffrey Seitzer ed. & trans., 2008). For recent adaptations of Schmitt's conception of strong popular sovereignty, see ANDREAS KALYVAS, *DEMOCRACY AND THE POLITICS OF THE EXTRAORDINARY*; MAX WEBER, CARL SCHMITT, AND HANNAH ARENDT 79–186 (2008); PAUL W. KAHN, *POLITICAL THEOLOGY: FOUR NEW CHAPTERS ON POLITICAL THEOLOGY* (2011).

⁶ BVerfG, 2 BvE 2/08, 30.6.2009.

⁷ The problem of the legitimacy of law has frequently been identified as the core problem in Schmitt's work. See HASSO HOFMANN, *LEGITIMITÄT GEGEN LEGALITÄT. DER WEG DER POLITISCHEN PHILOSOPHIE CARL SCHMITTS* [LEGITIMACY AGAINST LEGALITY. THE DEVELOPMENT OF CARL SCHMITT'S POLITICAL PHILOSOPHY] (2002) and DAVID DYZENHAUS, *LEGALITY AND LEGITIMACY*: CARL SCHMITT, HANS Kelsen AND HERMANN HELLER IN WEIMAR 38–101 (1997).

⁸ See SCHMITT, *CONSTITUTIONAL THEORY*, *supra* note 5, at 63–65; CARL SCHMITT, *POLITICAL THEOLOGY: FOUR CHAPTERS ON THE CONCEPT OF SOVEREIGNTY* 18–21 (George Schwab trans., 2006); CARL SCHMITT, *DER HÜTER DER VERFASSUNG* [THE GUARDIAN OF THE CONSTITUTION] 36–48 (1996).

regulates its own creation and application.⁹ It follows that there can be no constituent power that is outside of the law but that, nevertheless, has the authority to create law. If there is such a thing as a people, endowed with a legislative will, it must itself be a creature of law.¹⁰ The only way to make sense of talk of sovereignty, therefore, is to understand the doctrine of sovereignty as a confused perception of the autonomy of law.¹¹ The autonomy of positive law makes it both impossible and unnecessary to try to answer questions concerning the validity of law with reference to metalegal facts. And since Kelsen regards the validity of law and the normativity of law to be the same thing, he takes it to be both impossible and unnecessary to answer questions about the normativity of law with reference to metalegal facts. Since a society's constitution is a part of its legal system, the analysis of positive law provides a sufficient answer to all questions about the law that might concern constitutional jurisprudence.¹²

Kelsen's conception of legal normativity has given rise to serious difficulties of understanding that need not be discussed here.¹³ What is relevant for our purposes is how Schmitt understood it. Schmitt argues that if we hold that the law is normative, and if we take the law's normativity to be grounded in a basic norm (and not on a metalegal political will), we must consider the law to be morally justified, in the sense of being morally correct.¹⁴ As a result, Schmitt takes "normativist" legal positivists like Kelsen to be implicitly committed to the view that citizens and officials are morally bound by the decisions regarding legal or constitutional problems that are mandated by the positive law.¹⁵ However, Kelsen, as Schmitt rightly observes, explicitly holds that the basic norm is nothing more than a bare authorization of legislative acts that does not predetermine the content of law in any way, so that the law can take any content, however unjust.¹⁶ Given this background, Schmitt's major criticism of the *Pure Theory of Law* seems highly plausible. Schmitt argues that merely the fact that some decision has a legal basis, in a Kelsenian sense, cannot possibly entail that the decision in question is morally binding on citizens and officials. After all, a system of governance, by Kelsen's own apparent admission, may qualify as a legal system, and yet be nothing

⁹ See HANS Kelsen, INTRODUCTION TO THE PROBLEMS OF LEGAL THEORY: A TRANSLATION OF THE FIRST EDITION OF THE REINE RECHTSLEHRE OR PURE THEORY OF LAW 55–75 (Bonnie Litschewski Paulson & Stanley Paulson trans., 1992).

¹⁰ See Kelsen, VOM WESEN UND WERT DER DEMOKRATIE, *supra* note 3, at 14–18.

¹¹ See HANS Kelsen, DAS PROBLEM DER SOUVERÄNITÄT UND DIE THEORIE DES VÖLKERRECHTS. BEITRAG ZU EINER REINEN RECHTSLEHRE [THE PROBLEM OF SOVEREIGNTY AND THE THEORY OF INTERNATIONAL LAW. A CONTRIBUTION TO A PURE THEORY OF LAW] 85–101 (1920).

¹² See HANS Kelsen, DER SOZIOLOGISCHE UND DER JURISTISCHE STAATSBEGRIFF. KRITISCHE UNTERSUCHUNG DES VERHÄLTNISSSES VON STAAT UND RECHT [THE SOCIOLOGICAL AND THE JURISTIC CONCEPT OF THE STATE. A CRITICAL INVESTIGATION OF THE RELATIONSHIP OF STATE AND LAW] (1928).

¹³ For a helpful overview see Stanley L. Paulson, *Introduction*, in HANS Kelsen, INTRODUCTION TO THE PROBLEMS OF LEGAL THEORY, *supra* note 9, at xvii–xlii. A particularly illuminating analysis in JOSEPH RAZ, *The Purity of the Pure Theory*, in THE AUTHORITY OF LAW: ESSAYS ON LAW AND MORALITY 293–312 (2009).

¹⁴ This view is firmly entrenched in German jurisprudence and it is still defended by authors who have no sympathies whatsoever for Schmitt. See ROBERT ALEXY, BEGRIFF UND GELTUNG DES RECHTS [THE CONCEPT AND VALIDITY OF LAW] 154–197 (1994).

¹⁵ See SCHMITT, CONSTITUTIONAL THEORY, *supra* note 5, at 63–64.

¹⁶ See Kelsen, INTRODUCTION TO THE PROBLEMS OF LEGAL THEORY, *supra* note 9, at 23–25.

more than an organization of hideous oppression. Nevertheless, to hold that all law is normative, Schmitt concludes, and thus to imply that it deserves to be obeyed, is to reduce legitimacy to legality and to turn the law into a mere instrument of power.¹⁷

The standard reply to this kind of attack on legal positivism among contemporary defenders of positivism is to challenge Schmitt's assumption, that is, to deny that a conception of law that grounds the validity of law on a basic norm or "rule of recognition," and not on a metalegal political will, must take the law as making a justified claim to moral correctness. H. L. A. Hart has shown, according to contemporary positivists, how to conceive of legal systems as rule-based systems, and how to avoid a reduction of legal validity to the mere threat of punishment at the hands of an all-powerful sovereign, while holding onto a clear distinction between legal validity and moral correctness.¹⁸ Contemporary positivists are, therefore, happy to affirm the autonomy of positive law and to embrace emphatically the severance of legality and legitimacy. They typically emphasize that the fact that some decision is legal does not in itself tell us much about whether it merits our deference or compliance.¹⁹ The claim that positivism reduces legitimacy to legality is thus seen as misguided. The charge is relevant only against versions of positivism that take the law to be essentially legitimate. However, according to those who share Hart's approach, this view is simply not a part of modern legal positivism. Some law is morally good, some morally bad, and it is a task for normative political and moral theorists, not for descriptive legal theorists, to figure out which is which.²⁰

This perspective can easily be extended to the constitutional level. Some constitutional law is good, insofar as it sufficiently protects important values or rights and organizes political decision making in such a way as to enhance the chance of morally justifiable outcomes, while some constitutional law is bad in that it fails to do these things. A good constitution, one might plausibly go on to argue, will provide legitimacy to the ordinary laws enacted in accordance with it, but a bad constitution will not. The need to distinguish a legitimizing legality from mere legality, which lacks the power to legitimize, forces us to subject legality, in one way or another, to the tribunal of a moral reason external to law.

Schmitt embraces a rather different approach to the task of distinguishing between legitimate and illegitimate law, one that does not require us to subject law to the tribunal of moral reason. To avoid appeal to an external tribunal of moral reason, Schmitt denies the autonomy of positive law. According to Schmitt, the law is not founded on a basic norm or a rule of recognition, and it does not regulate its own creation and application. Rather, it is always the product of a prelegal political will that is not itself

¹⁷ See *supra* note 8, as well as CARL SCHMITT, *LEGALITY AND LEGITIMACY* (Jeffrey Seitzer ed. & trans., 2004).

¹⁸ See H.L.A. HART, *THE CONCEPT OF LAW* 79–123 (Joseph Raz & Penelope Bulloch eds., 1994).

¹⁹ See H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593 (1958); JOSEPH RAZ, *Authority, Law, and Morality*, in *ETHICS IN THE PUBLIC DOMAIN: ESSAYS IN THE MORALITY OF LAW AND POLITICS* 210–237 (1995); John Gardner, *Legal Positivism: 5½ Myths*, 46 AMER. J. JURIS. 199 (2001); Frederick Schauer, *Positivism as Pariah*, in *THE AUTONOMY OF LAW: ESSAYS ON LEGAL POSITIVISM* 31–55 (Robert P. George ed., 1996).

²⁰ For a forceful defense of the view that jurisprudence ought to be nonevaluative, see JULIE DICKSON, *EVALUATION AND LEGAL THEORY* (2001).

legally authorized to create law.²¹ The question whether law is legitimate or not, for Schmitt, must turn, therefore, on the character of the prelegal political will to which the law owes its existence.²² The question I would like to raise is whether this approach is capable of avoiding the problem of a reduction of legitimacy that allegedly afflicts Kelsen's conception of legality. I will argue that the answer is negative.

My argument, admittedly, rests on an intuition about the point and purpose of talk about legitimacy that Schmitt does not openly endorse, though I think a strong case can be made that he is committed to accepting it by virtue of his professed concern to defend the rule of law.²³ The intuition is that legitimacy has to do with arbitrating differences of interest and moral opinion through the use of fair legislative and adjudicative procedures and through the enforcement of essential normative constraints on the exercise of political power. We would not need to appeal to reasons for the legitimacy of a political decision if we had substantive agreement on how to act together, and we would not need an elaborate constitutional framework capable of producing legitimate outcomes, if we could count on forever continuing to enjoy such agreement. Appeals to legitimacy become relevant where people disagree, in a situation where a collective decision has to be taken, over what collective decision would be just or substantively correct, or where the future occurrence of such disagreement cannot be ruled out. In essence, an appeal to legitimacy claims that a collective decision is entitled to the deference of those who disagree with it on the merits, since the decision was brought about under certain rules and constraints, rules and constraints that are taken to be such that decisions arrived at through their use ought to be accepted as binding by all. If a set of rules and constraints carries this authority, and if it is recognized to do so, it will allow even those who disagree on substantive issues of policy to cooperate peacefully.²⁴

²¹ In Schmitt's own memorable phrase, in a state of exception "authority proves that to produce law it need not be based on law" (SCHMITT, *POLITICAL THEOLOGY*, *supra* note 8, at 13).

²² See SCHMITT, *CONSTITUTIONAL THEORY*, *supra* note 5, at 136.

²³ Schmitt frequently presented his arguments as growing from a concern to analyze the conditions of the legitimacy of the rule of law. See for example SCHMITT, *CONSTITUTIONAL THEORY*, *supra* note 5, at 169–252; SCHMITT, *LEGALITY AND LEGITIMACY*, *supra* note 17. The concern is equally central to Schmitt's conceptions of dictatorship and judicial review. See Carl Schmitt, *Die Diktatur des Reichspräsidenten nach Artikel 48 der Weimarer Verfassung* [*The Dictatorship of the President of the Reich under Article 48 of the Weimar Constitution*], in CARL SCHMITT, *DIE DIKTATUR. VON DEN ANFÄNGEN DES MODERNEN SOUVERÄNITÄTSGEDANKENS BIS ZUM PROLETARISCHEN KLASSENKAMPF* [DICTATORSHIP. FROM THE ORIGINS OF THE MODERN IDEA OF SOVEREIGNTY TO PROLETARIAN CLASS STRUGGLE] 211, 250–251 (1928); CARL SCHMITT, *DER HÜTER DER VERFASSUNG*, *supra* note 8, at 22–28. Schmitt's thinking on the legitimacy of legality can be traced back to his earliest works. See CARL SCHMITT, *GESETZ UND URTEIL. EINE UNTERSUCHUNG ZUM PROBLEM DER RECHTSPRAXIS* [STATUTE AND JUDGMENT. AN INQUIRY INTO THE PROBLEM OF LEGAL PRACTICE] (C. H. Beck 1969) (1912).

²⁴ For a more systematic presentation of this idea of legitimacy, see Jeremy Waldron, *The Core of the Case against Judicial Review*, 115 YALE L.J. 1346, 1386–1387 (2006). I take the conception of legitimacy outlined here to be central to the modern tradition of liberal political theory. It is implicit, for example, in Hobbes's claim that the parties to a social contract are bound to accept the will of the sovereign as standing in for their own, irrespective of whether they accept the sovereign's decisions as substantively correct. See THOMAS HOBBES, *LEVIATHAN* 32–33, 111–115, 120–121, 124 (Richard Tuck ed., 1996). It also underpins Max Weber's legal sociology, though its Weberian use is, of course, purely descriptive. See MAX WEBER, *ECONOMY AND SOCIETY: AN OUTLINE OF INTERPRETIVE SOCIOLOGY* 212–215 (Guenther Roth & Claus Wittich eds., 1978).

How does this understanding of the function and purpose of legitimacy (and thus, for Schmitt, of legal governance) apply to Schmitt's conception of the legitimacy of law? Schmitt's view would have to be, presumably, that positive legality will carry legitimacy—and thus be able to bridge differences of interest or moral opinion—if and only if the constitution that governs the creation of all ordinary positive law has been enacted through an exercise of strong popular sovereignty and continues to enjoy the tacit support of the popular sovereign.²⁵ In what follows, I will argue that this conception of legitimacy is incoherent. A short overview of Schmitt's constitutional theory will provide the background for my argument.

A constitution, according to Schmitt, is the product of an act of collective self-determination by which an already existing political community expresses its prelegal political identity in institutional form.²⁶ Schmitt consequently holds that the act of constitution giving cannot take the form of a social contract or agreement between different social groups.²⁷ If constitution giving presupposes the political existence of a people defined by a shared identity, instead of constituting a people, it must take the form of a unilateral and revisable choice on the part of the people. The constitution binds constituted powers that act under it; however, it cannot bind the people itself, which retains the power to create a new constitution through a renewed exercise of constituent power.²⁸ The basic principle of constitutional legitimacy, in other words, is the principle of collective autonomy, understood as the right of an already existing people freely to choose its own form of institutional life. The root of constitutional illegitimacy, on the other hand, is collective heteronomy, which obtains in a situation where a people is forced to live under a normative framework that is not (or not fully) the result of its own choice or that denies its inalienable constituent power.

Crucially, Schmitt sees full collective autonomy and heteronomy as exhaustive and mutually exclusive alternatives, and he assimilates all the ways in which a people might be subject to a legal order not under its own complete control to the brute denial of self-determination.²⁹ In Schmitt's view, there can be no legitimate coexistence of different nations with differing political identities under equal but binding terms of supranational law created by mutual accord.³⁰ What is more, the view also implies that a domestic constitution that is the product of a compromise among different groups—groups that each have their own political identity—and not the product of an exercise of strong popular sovereignty, can be nothing more than a veiled form of subjection of one group to another.³¹

²⁵ See SCHMITT, *CONSTITUTIONAL THEORY*, *supra* note 5, at 136–139.

²⁶ See *id.* at 75–77.

²⁷ See *id.* at 112–113.

²⁸ See *id.* at 127–9, 140–146.

²⁹ See CARL SCHMITT, *THE CONCEPT OF THE POLITICAL*, EXPANDED EDITION 45–53 (George Schwab trans., 2007).

³⁰ See Carl Schmitt, *Die Kernfrage des Völkerbundes [The Core Question of the League of Nations]*, in CARL SCHMITT, *FRIEDEN ODER PAZIFISMUS? ARBEITEN ZUM VÖLKERRECHT UND ZUR INTERNATIONALEN POLITIK, 1924–1978 [PEACE OR PACIFISM? WORKS ON INTERNATIONAL LAW AND INTERNATIONAL POLITICS, 1924–1978]* 73–193 (Günther Maschke ed., 2005).

³¹ See Carl Schmitt, *Staatsethik und pluralistischer Staat [State Ethics and the Pluralist State]*, in CARL SCHMITT, *POSITIONEN UND BEGRIFFE IM KAMPF MIT WEIMAR—GENÈVE—VERSAILLES, 1923–1939 [POSITIONS AND CONCEPTS IN THE STRUGGLE WITH WEIMAR—GENÈVE—VERSAILLES, 1923–1939]* 161–165 (1988); SCHMITT, *LEGALITY AND LEGITIMACY*, *supra* note 17; CARL SCHMITT, *THE LEVIATHAN IN THE STATE THEORY OF THOMAS HOBBS. MEANING AND FAILURE OF A POLITICAL SYMBOL* 65–78 (George Schwab & Erna Hilfstein trans., 2008).

Schmitt's tendency to assimilate every form of subjection of a people to a law it has not autonomously chosen and that it cannot abrogate at will to heteronomy stems from his legal decisionism.³² Schmitt's legal decisionism claims that a legal norm will acquire a clear meaning only in a concrete context of application. And the decision in a concrete context of application, Schmitt thinks, may owe as much to the decisions of the interpreter of the legal norm as to the norm itself. Someone who is subject to a legal system, then, is never merely subject to its laws. He or she is also, and more importantly, subject to those who apply them. This is not a problem, Schmitt holds, as long as those who interpret and apply the law as well as those who are subject to it share the same political identity. The sharing of identity will entail normative agreement between interpreters and subjects and, thus, give determinacy and predictability to the law, despite the fact that abstract legal rules underdetermine their concrete applications.³³ However, decisionism inevitably becomes a problem of legitimacy if those who apply the law and those who are subject to it do not share the same political identity, as is likely the case in the sphere of international politics or in the sphere of constitutional politics in a polity divided into different social groups with profoundly different political identities. In such a scenario, subjection to the law will turn into a veiled form of subjection to an alien political will, a will that abuses the law for its own political purposes, to suppress political dissent.³⁴

Schmitt goes so far as to claim that a people or nation exists as a political community only while it enjoys uncompromised collective self-determination and is free from all subjection to law not fully under its own volitional control.³⁵ Political communities, in contrast to individual human beings, do not have biological existence. Hence, the existence of a political community cannot, as in the case of the individual who subjects herself to a state to protect her biological existence, be separated from self-determination. The life of a political community can consist solely in its striving to express or to manifest its particular identity in a self-chosen institutional form.³⁶ For a political community to acquiesce in its subjection to a law that is not fully its own—that is, to acquiesce in subjection to a law that is not created by itself alone, not open to unilateral abrogation, and not applied by its own members—is the same thing as its having lost, or never having attained, the quality of political community.³⁷ To ask a political community to abandon full self-determination and to subject itself to some supranational authority is to demand that it commit political suicide, a demand that a political community may always justifiably reject. The existence of political community,

³² For Schmitt's decisionism, see SCHMITT, *POLITICAL THEOLOGY*, *supra* note 8, at 5–35; SCHMITT, *GESETZ UND URTEIL*, *supra* note 23.

³³ See SCHMITT, *GESETZ UND URTEIL*, *supra* note 23, at 68–114; William E. Scheuerman, *Legal Indeterminacy and the Origins of Nazi Legal Thought: The Case of Carl Schmitt*, in 17 *HIST. POL. THOUGHT* 57 (1996).

³⁴ See SCHMITT, *THE CONCEPT OF THE POLITICAL*, *supra* note 29, at 26–27, 66–67.

³⁵ See *id.* at 45–53.

³⁶ See SCHMITT, *CONSTITUTIONAL THEORY*, *supra* note 5, at 125.

³⁷ SCHMITT, *THE CONCEPT OF THE POLITICAL*, *supra* note 29, at 54: "If a people no longer possesses the energy or the will to maintain itself in the sphere of politics, the latter will not thereby vanish from the world. Only a weak people will disappear."

Schmitt holds, does not itself stand in need of external justification. A political community has a right to preserve itself, and to do whatever seems necessary for its self-preservation, as much as any individual in a state of nature.³⁸

If a people is to possess a political identity that is available prior to all legal or constitutional order, Schmitt has to explain what makes for the prelegal political existence of a people.³⁹ Schmitt argues that the identity of a political community must be based on a concrete or particular marker of collective identity. The markers of collective identity that may come to constitute political community are many; they can be ethnic, linguistic, religious, cultural, economic, and so on. What turns any such marker of identity into the basis of a prelegal political identity is that it forms the primary basis of identification for a group of people. And a basis for group identification is primary, according to Schmitt, if and only if it has the power to give rise to a friend-enemy distinction, in effect, if people are willing to fight and die in defense of the form of life that constitutes the substance of the group's political existence. Hence the notorious claim that "the political" is defined by the distinction between friend and enemy.⁴⁰

The resulting political hostility is directed against all those who are not members of the group because they do not share the identity that defines it. To protect its autonomy, and thus to maintain its existence, Schmitt claims, a political community must defend itself on two fronts: on the one hand, against internal enemies who undermine a people's capacity to fight for its autonomy, by weakening the basis of its collective identity,⁴¹ and, on the other hand, against external enemies seeking to force it to accept a form of life not of its own choice.⁴²

Schmitt is at pains to point out that political hostility does not entail the permanence of open external war or of violent civil strife. Much like Hobbes, he holds that the nature of war does not consist in open fighting but in the potential for violent conflict.⁴³ Nonetheless, Schmitt's view clearly does imply that an unrestricted *jus ad bellum* against external enemies, as well as a right to set aside the constitution at its discretion in order to fight internal enemies, are among the essential prerogatives of a political community. The law's protections, therefore, apply only to those who fit into the identity of the people and who are willing to accept the polity as the primary community entitled to dispose of their lives.⁴⁴ The process of constitution giving, therefore, presupposes that the question of the identity of the people has been settled and that internal enemies of the people who do not fit in have been removed and that external enemies have been successfully repelled.⁴⁵

³⁸ See SCHMITT, *CONSTITUTIONAL THEORY*, *supra* note 5, at 75–77.

³⁹ This is the question Schmitt tries to answer in *THE CONCEPT OF THE POLITICAL*.

⁴⁰ See SCHMITT, *THE CONCEPT OF THE POLITICAL*, *supra* note 29, at 25–37.

⁴¹ See *id.* at 37–45 and the texts quoted in *supra* notes 30 & 31.

⁴² See *id.* at 45–53.

⁴³ See *id.* at 33–34.

⁴⁴ See *id.* at 46–48.

⁴⁵ Schmitt argues that democratic equality presupposes homogeneity in political identity. See CARL SCHMITT, *THE CRISIS OF PARLIAMENTARY DEMOCRACY* 8–17 (Ellen Kennedy trans., 1988); SCHMITT, *CONSTITUTIONAL THEORY*, *supra* note 5, at 259–267.

A comprehensive evaluation of the different elements of Schmitt's legal and political theory is beyond the scope of this paper. However, our thumbnail account should suffice to address the question whether Schmitt manages to avoid a reduction of legitimacy. The answer, I believe, is negative. Instead of reducing legitimacy to legality, Schmitt performs an even more problematic reduction of legitimacy to identity.

Schmitt's notion of strong popular sovereignty embeds an extreme rejection of the possibility of legitimate conflict resolution through law. We either agree about how our community's moral identity is to be understood and about how it is to be run or we disagree. But every nontrivial disagreement raises the specter of the political and is, therefore, not open to legal resolution. Any attempt to impose a legal resolution on a truly political conflict, Schmitt thinks, can be nothing more than a particularly perfidious political weapon that tries to deny the enemy's right to defend his own political existence as he sees fit.⁴⁶ Constitutional law can, therefore, never provide legitimacy for collective decisions that are to be taken for and by a collective that contains social groups divided by profound differences in moral opinion or political identity.⁴⁷ International law, for the same reasons, can never legitimately offer authoritative arbitration among several nations differing in political identity.⁴⁸

One of the most troubling symptoms of Schmitt's reduction of legitimacy to identity is that his constitutional theory fails to provide any very interesting reason for why a constituted constitutional system ought to be democratic, in the usual sense of the term. Presumably, Schmitt's conception of strong popular sovereignty implies that the fact that a state's constitution might accord equal democratic rights to all those who are subject to it would not suffice to justify it if it were not also chosen by the people acting as constituent power and did not also express a preexisting, homogeneous identity. And if a constitution were chosen by the people as constituent power yet failed to accord equal democratic rights to all those who are subject to it then that, or so it appears, would not show that the constitution must be unjustified. It would merely imply, as Schmitt himself explicitly suggests, that those not given equal rights simply do not belong to the people.⁴⁹

Schmitt's claim that strong popular sovereignty, and only strong popular sovereignty, can ground the legitimacy of law thus turns out to be a piece of empty rhetoric. Of course, I will never complain that the law is unjustified if it is made by people who share my own moral identity, for the simple reason that such law is always going to reflect my own convictions. Still, this does not entail that the law is legitimate or that I recognize it to be so. To recognize the law as legitimate, I would have to hold that I ought to defer to the law even in case it did not reflect my own convictions. Schmitt, as we have seen, does not think that I should ever assume such a stance. If the law does not reflect my own convictions, Schmitt argues, it must have been made

⁴⁶ See, for instance, Carl Schmitt, *Völkerrechtliche Formen des modernen Imperialismus* [Forms of Modern Imperialism in International Law], in SCHMITT, POSITIONEN UND BEGRIFFE, *supra* note 31, at 184–203.

⁴⁷ See SCHMITT, DER HÜTER DER VERFASSUNG, *supra* note 8, at 36–48.

⁴⁸ See Schmitt, *Die Kernfrage des Völkerbundes*, *supra* note 30, at 123.

⁴⁹ See SCHMITT, CONSTITUTIONAL THEORY, *supra* note 5, at 261–263.

by people who do not share my identity and, therefore, cannot truly belong to my own political group but must be, rather, internal or external enemies. Strong popular sovereignty, then, simply has no room for the concept of legitimacy, though the position is promoted by Schmitt as a result of a reflection on the conditions of legitimate legality.⁵⁰

One might reply that the argument presented here begs the question against Schmitt, since it arbitrarily stipulates an understanding of legitimacy that Schmitt may not have shared.⁵¹ I do not think that this reply gets Schmitt very far. If legitimacy is reduced to identity, then legitimacy can no longer play the role that typically it has served, namely, to allow for justifiable collective decision taking under conditions of nontrivial normative disagreement. This function of appeals to legitimacy is evidently at the center, for example, of Max Weber's famous theory of legitimacy, though Weber is, of course, uninterested in the normative appraisal of claims to legitimacy.⁵² Hobbes, though he did not use the language of legitimacy, clearly attributed a similar function to the authority of law.⁵³ The concept of legitimacy, as it is understood here, is equally central to contemporary jurisprudential and political-philosophical debate.⁵⁴ Of course, Schmitt is free to redefine the notion of legitimacy in whichever way he pleases and, thus, to turn a debate about the conditions under which we can justifiably expect people to submit to collective decisions they do not hold to be substantively correct into an apology for a politics of the violent elimination of social difference. However, if the redefinition of a political concept simply switches the subject, it can no longer be defended on the ground that it makes an important contribution to a debate that presupposes the prior meaning of the concept. And Schmitt—apart from excoriating Kelsen for allegedly reducing legitimacy to mere legality—did venture to make contributions to debates about the conditions of political legitimacy in

⁵⁰ See *supra* note 23. For a somewhat similar criticism, see David Dyzenhaus, *The Politics of the Question of Constituent Power*, in *THE PARADOX OF CONSTITUTIONALISM: CONSTITUENT POWER AND CONSTITUTIONAL FORM* 129, 132, 143–144 (Martin Loughlin & Neil Walker ed., 2007). Dyzenhaus agrees that Schmitt's view has no room for legitimate law, but he argues that this does not signal incoherence since Schmitt did not intend to put forward a theory of legal legitimacy. Rather, Schmitt intended to deny "that legality possesses intrinsic normative qualities, the kind of qualities that make law as such authoritative" (*id.* at 132). As far as I can see, Schmitt is not simply making the standard positivist point that law is not necessarily authoritative or legitimate. His view of "the political" as the basis of law carries the stronger implication that no legal or constitutional system, however configured, could have legitimating powers. And this implication fails to cohere with the major explicit claim about legality and legitimacy that Schmitt defended throughout the Weimar years: that law is authoritative or legitimate, for members of a political community, whenever the metalegal social conditions of its proper functioning are given. My argument is that this claim is empty since the metalegal conditions will only obtain where there is no profound disagreement, that is, where problems of decisional legitimacy are no longer an issue. It is important to acknowledge this inconsistency, since it undercuts the popular claim that Schmitt's pre-Nazi works can teach us important lessons on the hidden presuppositions of liberal-democratic constitutional legitimacy.

⁵¹ I owe this point to David Dyzenhaus.

⁵² See MAX WEBER, *ECONOMY AND SOCIETY*, *supra* note 24, at 215.

⁵³ See THOMAS HOBBS, *LEVIATHAN*, *supra* note 24, at 32–33, 111–115, 120–121, 124.

⁵⁴ See, for instance, Joseph Raz, *Authority, Law, and Morality*, *supra* note 19; THOMAS CHRISTIANO, *THE CONSTITUTION OF EQUALITY: DEMOCRATIC AUTHORITY AND ITS LIMITS* 231–259 (2008).

the common understanding of the concept, as should be clear, for example, from his discussions of parliamentarianism⁵⁵ or of the rule of law.⁵⁶

Another objection to the claim that Schmitt's conception of strong popular sovereignty leaves no room for considerations of legitimacy focuses on the politics that takes place below the threshold of the political. Schmitt is not committed to the claim, or so one might argue, that every social conflict must reach an intensity that raises the specter of a friend-enemy distinction and that puts the dissenters outside the community. Even in a homogeneous state, constituted by an exercise of strong popular sovereignty, people will continue to disagree about a great many questions that do not give rise to political enmity. They will settle such disputes peacefully, by employing the procedures provided for in their constitution, which is validated by strong popular sovereignty. It seems to follow that strong popular sovereignty has room for legitimacy, at least where social conflict remains below the threshold of the friend-enemy distinction.

This objection fails once we take a closer look at the motives that might govern people's compliance with political decisions reached on the basis of constitutional procedure. Clearly, if a social group complies with political decisions reached on the basis of constitutional procedure not because it considers those decisions to be fair but only because it fears to be even worse off in a situation of civil war, its compliance below the threshold of political enmity will have nothing to do with a recognition, on the group's part, of the law's claim to legitimacy. Hence, one cannot, in that case, hold that strong popular sovereignty provides a ground for claims to legitimacy. If, on the other hand, people accept an obligation to defer to a decision they hold to be substantively wrong on the ground that the decision was taken under a fair procedure, their recognition of legitimacy will have nothing to do with the principle of strong popular sovereignty. In that case, it is not the fact that the constitution was created by an exercise of strong popular sovereignty but, rather, the way in which the constitution proposes to deal with disagreement that justifies the law's claim to legitimacy. If we do not disagree, finally, because we share the same political identity, there will be no problem of compliance and legitimacy will once again fall out of the picture. If these are all the relevant options, it would seem to follow that the principle of strong popular sovereignty can never play any role in legitimizing decisions below the threshold of the political. As a result, there is still no room for considerations of legitimacy.

Schmitt's stark, exclusive alternative between complete identity and enmity, as well as his radical skepticism about the possibility of legitimate conflict resolution through law is not likely to strike us as awfully plausible. Proponents of strong popular sovereignty might try, therefore, to dissociate the idea of strong popular sovereignty from Schmitt's conception of the political. But if we hold that legitimate conflict resolution through law is possible, we will inevitably be led to embrace a weak as opposed to

⁵⁵ Schmitt tries to offer a list of the conditions under which parliamentary decisions would be legitimate, in the sense of deserving deference, in SCHMITT, *THE CRISIS OF PARLIAMENTARY DEMOCRACY*, *supra* note 45, at 33–50, as well as in CARL SCHMITT, *LEGACITY AND LEGITIMACY*, *supra* note 17, at 17–36.

⁵⁶ See SCHMITT, *CONSTITUTIONAL THEORY*, *supra* note 5, at 169–234.

a strong conception of popular sovereignty. To say that political conflicts are amenable to legitimate arbitration through law is to say that legal or constitutional frameworks can become constitutive of political community, and that they can be brought into existence through mutual agreement, instead of having to be expressions of an antecedent identity (or, alternatively, instruments of oppressive indirect rule). And if it is desirable for political conflicts to be resolved through the law and not through the use of force, political community ought to be constituted by law. Strong popular sovereignty will, in other words, become otiose and even undesirable if legitimate conflict resolution through law is possible. A defense of strong popular sovereignty, then, must embrace something like Schmitt's radical conception of political existence and his thoroughgoing attack on the possibility of impartial law. The weaknesses of Schmitt's constitutional theory consequently will afflict all conceptions of strong popular sovereignty.

Strong popular sovereignty, at the end of the day, turns out to be a lot more inimical to the concept of legitimate law than the positivist insistence on the autonomy of law that Schmitt set out to challenge. The view that positive law is autonomous robs the law of all inherent legitimacy, but it can still be combined with an account of what accidental characteristics make law legitimate. A conception of strong popular sovereignty, by contrast, denies the very possibility of legitimate law. These observations, or so one would think, amount to a *reductio ad absurdum* of strong popular sovereignty and show its complete unsuitability for contemporary democratic constitutional theory. I will now argue that this result can be confirmed by critical analysis of the *Lisbon* decision by the Federal Constitutional Court.

3. Schmitt in Karlsruhe: The incoherence of popular sovereignty and the *Lisbon* decision of the Bundesverfassungsgericht

The 2009 *Lisbon* decision of the German Federal Constitutional Court was concerned with the question whether the Treaty of Lisbon, as well as the national norms that were to be enacted to implement its provisions, were compatible with the German Grundgesetz (GG) or Basic Law.⁵⁷ The Court took the view that the Treaty of Lisbon did not violate the GG; however, it mandated changes to one of the national implementing norms. In taking its decision, moreover, the Court laid out a general theory of the limits of the constitutionally permissible deepening of European integration. This theory is based on a conception of strong popular sovereignty that bears certain similarities to Schmitt's, though Schmitt, needless to say, is not cited in the judgment.⁵⁸

⁵⁷ BVerfG, 2 BvE 2/08, 30.6.2009 (henceforth: BVerfG–Lisbon).

⁵⁸ In the *Maastricht* decision, the BVerfG introduced a conception of the state akin to Schmitt's by quoting Hermann Heller. See ROBERT CHR. VAN OYEN, DIE STAATSTHEORIE DES BUNDESVERFASSUNGSGERICHTS. VON SOLANGE ÜBER MAASTRICHT ZU LISSABON [THE STATE-THEORY OF THE BUNDESVERFASSUNGSGERICHT. FROM SOLANGE TO MAASTRICHT AND LISBON] 31–7 (2010). For a critical discussion of Schmitt's influence on the *Maastricht* decision see Joseph H.H. Weiler, *Does Europe Need a Constitution? Demos, Telos, and the German Maastricht Decision*, 1 EUR. L.J. 219 (1995).

The Court's reliance on strong popular sovereignty, I will now argue, undercuts its reasoning. Just like Schmitt, the Court fails to escape the incoherence of strong popular sovereignty.

According to the Court's *Lisbon* decision, the GG, though it provides a constitutional mandate for European integration, does not permit a transformation of the EU from a federation of states under international law into a federal state. The Court argues that the GG derives from the constituent power of the German people, and it holds that the constitutional decision of the popular sovereign has endowed the GG with a substantive normative core that is immune even to the amendment process.⁵⁹ The Court points out that the principle of democracy is part of the unamendable core of the German Constitution, and it goes on to claim that a transformation of the EU into a federal state through an exercise of constituted power, such as the power of constitutional amendment, would undermine democracy in Germany and, therefore, violate the GG.⁶⁰ A legitimate European federal state could only be created through a renewed exercise of constituent power abrogating the GG in favor of a pan-European constitution, which would have to be founded by a pan-European exercise of constituent power on the part of the several European peoples acting as one political community.⁶¹ As long as the GG is in force, European integration can only proceed by transfer of individual and clearly delimited competences through international treaty, and that transfer, the Court argues, is restricted by the principle that the national political level must retain decisive influence over core areas of policy.⁶²

The Court's argument echoes Schmitt's constitutional theory. In his *Verfassungslehre*, Schmitt claims that any constitution contains an unamendable core, notwithstanding the fact that constitutions typically, unlike the GG, contain procedures for amendment that are not explicitly limited in scope. Schmitt took the Weimar Constitution, for example, to be based on a fundamental decision, on the part of the constituent power, to make Germany a liberal democracy. For this reason, Schmitt argued, in the 1920s, that it would be unconstitutional to turn Weimar Germany into a socialist state through the exercise of the constitutional power of amendment, though that power was not explicitly limited by the constitutional text. Such a use of the amendment formula of the Weimar constitution, in Schmitt's view, would have amounted to an unjustifiable usurpation of constituent power on the part of a constituted power.⁶³

The Federal Constitutional Court adopts a similar line of reasoning in the *Lisbon* decision, claiming that the German legislator, even if acting under the amendment formula, lacks the power to validate a federalization of the EU. Of course, the doctrine of a constitutional core has a firm basis in the text of the GG itself, which might seem to speak against the hypothesis that the Court's argument is inspired by Schmitt. Article 79 of the GG explicitly determines that principles embedded in the first twenty articles

⁵⁹ BverfG–Lisbon, par. 216.

⁶⁰ BverfG–Lisbon, par. 246–247, 263–264.

⁶¹ BverfG–Lisbon, par. 334, 340, 346–348.

⁶² BverfG–Lisbon, par. 226.

⁶³ See SCHMITT, *CONSTITUTIONAL THEORY*, *supra* note 5, at 148–458.

of the GG may not be abrogated through constitutional amendment. The first nineteen of these articles contain a bill of rights, while the twentieth article protects the principle of democracy. Therefore, it would seem, at first glance, that the Court could have based its argument simply on an appeal to textually explicit positive German constitutional law, instead of invoking a conception of strong popular sovereignty.

Exclusive reliance on the Constitution's explicit text, however, would not have been sufficient to generate the conclusion that a transformation of the EU into a federal state through exercises of constituted power must necessarily conflict with the GG. After all, the rights and principles ostensibly protected by the eternity clause of article 79 are all protected on the European level as well. What is more, it would clearly be possible, at least in principle, to endow a federal EU created through the treaty process with a perfectly democratic set of political procedures that provide all citizens of the EU with full and equal democratic rights. In other words, the text of the GG seems open to an interpretation according to which the GG makes it impermissible, even for a parliamentary supermajority, to subject German citizens to a supranational regime that does not sufficiently protect individual rights and that is not fully democratic, while it permits the powers constituted by the GG to participate in the creation of a supranational federal state that lives up to the substantive standards of rights and democracy protected by the GG. In fact, a minority of the Court had taken precisely this softer view in an earlier decision (*Solange*) concerning European integration.⁶⁴

In order to ward off this challenge, the Court's argument relies heavily on the thesis that the principle of democracy, which undoubtedly belongs to the unamendable core of the Constitution, requires uncompromised German external sovereignty.⁶⁵ It should be clear that the claim that democracy requires full external sovereignty cannot be based on an exegesis of positive constitutional law. It is a political-philosophical claim that must be defended on the basis of a general conception of democracy. The Court seems to acknowledge this point. It argues, in effect, that the relationship between democracy and external sovereignty is grounded in the nature of democracy, so that it is in principle impossible for there to be a democracy that does not enjoy full external sovereignty. And because democracy, in the view of the Court, essentially requires full external sovereignty to turn the EU into a federal state, however democratic in its procedures, would be unconstitutional under the GG without a renewed exercise of constituent power.

The reason why, in the Court's view, democracy essentially requires unrestricted external sovereignty is that any infringement of external sovereignty would infringe upon the constituent power of the people.⁶⁶ In other words, external sovereignty is essential to democracy because strong popular sovereignty is. According to the Court, the German people's political existence implies that the German people, if it so chooses, can give itself a new constitution that overturns the GG and all the decisions derived from it. Constituted powers acting under the GG, by contrast, cannot have a mandate

⁶⁴ See VAN OYEN, *DIE STAATSTHEORIE DES BUNDESVERFASSUNGSGERICHTS*, *supra* note 58, at 14–16.

⁶⁵ BVerfG–Lisbon, par. 246–248.

⁶⁶ BVerfG–Lisbon, par. 228, 298.

to deprive the German people of its preconstitutional power to decide for itself on its own form of political life. Any attempt by the constituted powers to turn Germany into a part of a European federal state that has the power to determine its own competences, and from which unilateral exit is no longer possible, would therefore be illegitimate, as it would have the effect, if successful, of depriving the German people of its constituent power, that is, of the power to determine its own form of political life for itself.⁶⁷ To possess this power, the Court seems to agree with Schmitt, is what it means for a people to exist politically. The conclusion that democracy requires full external sovereignty trivially follows.⁶⁸

Note that this argumentative strategy has an interesting implication. According to the Constitutional Court, it is not just that the Constitution which the German people (allegedly) happens to have given itself—the GG—rules out turning the EU into a federal state; rather, it is impossible for the German people to give itself a constitution that would allow for turning the EU into a federal state. There can be a German constitution only for as long as there is a German people, and a German people can exist only for as long as it is fully self-determining.⁶⁹ The creation of a European constitution, therefore, would require that the German people decide to put a complete end to their own political existence and to become a constituent part of a European popular sovereign that fully supersedes the political existence of the German people.⁷⁰

⁶⁷ BVerfG–Lisbon, par. 340. The Court's use of the notion of constituent power stands in tension with prevailing German constitutional-theoretical doctrine, which has tended to side with Kelsen in denying the legal relevance of an extralegal constitutional power. See Christoph Möllers, 'We are (afraid of) the people': *Constituent Power in German Constitutionalism*, in *THE PARADOX OF CONSTITUTIONALISM*, *supra* note 50, at 94–101.

⁶⁸ Erik Oddvar Eriksen and John Erik Fossum argue that the eternity clause, given the liberal content of the provisions it shields from amendment, "can only be properly grounded in a cosmopolitan legal system." As a result, they take the judgment, or at least one important strand of the judgment, to be more open to the idea of supranational democracy than I suggest. See Erik Oddvar Eriksen & John Erik Fossum, *Bringing European Democracy Back In—Or How to Read the German Constitutional Court's Lisbon Treaty Ruling*, 17 EUR. L.J. 153, 166–167, 171 (2011). However, as far as I can see, neither Schmitt nor the Court would agree with Eriksen's and Fossum's assumption that an unamendable constitutional core protecting liberal values can only be grounded in a cosmopolitan legal system. As discussed above, Schmitt argues in his *CONSTITUTIONAL THEORY* that an unamendable constitutional core is validated by a historical choice through which a popular sovereign expresses its particular political identity. Due to the principle of popular sovereignty, the core is shielded against being changed by any constituted power but not against renewed exercises of constituent power on the part of the popular sovereign. See SCHMITT, *CONSTITUTIONAL THEORY*, *supra* note 5, at 75–81, 145–58. If applied to the GG, this view will imply that the eternity clause is constitutionally validated not by its cosmopolitan content but by a decision on the part of the German people as constituent power that could have validated a different constitutional core (and that may yet come to do so in the future). Hence, the fact that the core actually chosen, for now, happens to overlap in content with cosmopolitan values is not what gives the core constitutional standing, in a Schmittian view. The Court itself explicitly refuses to disavow this interpretation of the eternity clause, thus signaling that it takes reliance on a Schmittian conception of the constitutional core to be a possible approach to interpreting the eternity clause of the GG. See BVerfG–Lisbon, par. 217. Dieter Grimm explicitly argues that giving primacy to cosmopolitan values would amount to a denial of the popular sovereignty of the German people. See DIETER GRIMM, *SOVERÄNITÄT. HERKUNFT UND ZUKUNFT EINES SCHLÜSSELBEGRIFFS* [SOVEREIGNTY. ORIGIN AND FUTURE OF A KEY CONCEPT] 119–123 (2009).

⁶⁹ BVerfG–Lisbon, par. 231.

⁷⁰ BVerfG–Lisbon, par. 347.

Since this argument claims to be based on the nature of the relation of sovereignty and democracy, and not on the contingent content of positive constitutional law, the Court takes it to hold for all European peoples, not just for the German people.⁷¹ Of course, if no European people can give itself a constitution that allows for turning the EU into a federal state, it must be impossible for the European peoples to confederate themselves into a federal state through a process of “constitutional synthesis” that builds on existing national constitutions.⁷² No procedure based on the exercise of constituted powers in the several European nations, however consensual and however participatory, could possibly generate a European constitution or an EU endowed with the attributes of statehood. For a European state to come into existence, the individual members of the European peoples would have to reconstitute themselves, outside of all constituted legal procedure, as a European people able to give itself a European constitution. Short of this happening, the EU must necessarily remain a *Staatenverbund*, a mere confederation of states that retain full national sovereignty.⁷³

As should be clear, the crucial part of the Court’s argument is the claim that democracy essentially requires external sovereignty, which is, in turn, based on the idea that democracy essentially requires strong popular sovereignty. We must try, therefore, to understand how the Court justifies this latter claim. To the credit of the Constitutional Court, it does not openly rely on Schmitt’s blunt assertion that true democracy requires antecedent homogeneity.⁷⁴ Rather, it tries to domesticate the idea of strong popular sovereignty by arguing that strong popular sovereignty, or full collective self-determination, is necessary to give effect to individual democratic rights and thus to endow democracy with legitimating power.⁷⁵

The Court’s argument starts out from a number of seemingly plausible assumptions about the conception of democracy protected by the GG.⁷⁶ For a democracy to be legitimate, every citizen must have an equal right, the Court argues, to participate in and to influence collective decision taking. What is more, the Court holds that since democracy entails that the government is held responsible by the electorate, a well-functioning democracy depends on a robust public sphere that enforces transparency in government and in which all important interests and groups have the opportunity to voice their concerns and to be heard.⁷⁷ These conditions of well-functioning democracy, the Court claims, are not at present satisfied by the EU, since its procedural

⁷¹ BVerfG–Lisbon, par. 334, 347.

⁷² See JON ERIK FOSSUM & AGUSTÍN JOSÉ MENÉNDEZ, *THE CONSTITUTION’S GIFT: A CONSTITUTIONAL THEORY FOR A DEMOCRATIC EUROPEAN UNION* 45–76 (2011).

⁷³ BVerfG–Lisbon, par. 229.

⁷⁴ See the texts cited *supra* note 45.

⁷⁵ For a similar argument see GRIMM, *SOVERÄNITÄT*, *supra* note 68, at 99–123.

⁷⁶ I will not question these assumptions here. However, it should be noted that the Court’s understanding of equality in political rights seems to deny the legitimacy of federal democratic systems of the sort practiced in the U.S. and in the Federal Republic of Germany itself. See Christoph Schönberger, *Lisbon in Karlsruhe: Maastricht’s Epigones at Sea*, 10 GER. L.J. 1201, 1214–1216 (2009); Daniel Halberstam & Christoph Möllers, *The German Constitutional Court says “Ja zu Deutschland”*, 10 GER. L.J. 1241, 1247–1249 (2009).

⁷⁷ BVerfG–Lisbon, par. 208–215, 250.

mechanisms fail to provide for rights of participation that allocate equal influence to all European citizens, and since it lacks a robust, pan-European public sphere that would be capable of holding a pan-European government to account.⁷⁸

The obvious conclusion to draw from these observations, it would seem, is that turning the EU into a federal state is presently unconstitutional, under the GG, for the reason that the EU is not yet a fully democratic polity but, rather, a regime characterized by a clear democratic deficit. To turn over the issues involved in *Kompetenz-Kompetenz* to an undemocratic institution would clearly violate the core constitutional principle of democracy, insofar as it would subject citizens to a regime that is no longer fully accountable to them. However, this obvious conclusion does not imply that it would still be unconstitutional to turn the EU into a federal state if its democratic deficit somehow could be remedied. In other words, the obvious conclusion would not support the idea that it is, in principle, impossible to create a true European polity without abrogating the GG and other national constitutions through a pan-European exercise of constituent power that, at the same time, would have to signal the end of the political existence of the German people as well as of all other European peoples.

While the Court does claim that the EU's institutional framework is currently plagued by a democratic deficit, it does not really put a whole lot of emphasis on this point. This should not occasion surprise. If democracy is understood as the unbridled self-determination of a people, then a polity by definition cannot be democratic until its constitution has become the expression of the political existence of a fully self-determining people. However, given this Schmittian logic, if there ever is to be a pan-European constituent power, it will have to replace the constituent powers of the several nations. The democratic deficit of the EU must, therefore, continue to exist for as long as the German or Polish or Spanish or French peoples continue to exist, regardless of how the institutional framework of the EU might come to be transformed. In other words, the EU's democratic deficit, from the Court's point of view, is not a remediable defect of the EU as it presently exists or as it could come to be through exercises of constituted powers. It is an essential feature of a *Staatenverbund* in which national governments and legislators, as representatives of the several European peoples, call the tune.⁷⁹ The real weight of the Court's argument must rest, therefore, on some other basis than the complaint that the EU's institutional structure suffers from a democratic deficit that could, in principle, be tackled through gradual institutional reform.

So where does the weight of the Court's argument come to rest? The Court, it seems, slides from the plausible view that well-functioning democracy has a number of institutional, communicative, and political-cultural presuppositions that are presently unfulfilled by the EU into the considerably less plausible view that these

⁷⁸ BVerfG–Lisbon, par. 280–281.

⁷⁹ The Court consequently argues that the EU need not meet the standards of democratic legitimacy that apply in the national context, precisely because it is only a *Staatenverbund*. See BVerfG–Lisbon, par. 271. All this makes the Court's genuflections to the standard rhetoric about the EU's democratic deficit appear rather hypocritical. See Schönberger, *Lisbon in Karlsruhe*, *supra* n. 76, 1210; Halberstam & Möllers, *The German Constitutional Court*, *supra* note 76, at 1251.

presuppositions cannot, in principle, be fulfilled in a polity not based on strong popular sovereignty. Since strong popular sovereignty, at least for now, can only exist in the context of the nation-state, it follows, in the Court's view, that the EU is not a candidate for a legitimate democratic polity. Unfortunately, the Court does not make much of an effort to explain why a well-functioning democracy must be based on strong popular sovereignty.⁸⁰ To repeat: if the problem were merely that individuals currently do not enjoy equal and equally effective rights of democratic participation on the European level, the problem should, at least in principle, be soluble by giving all European citizens equal rights of participation and by building a robust pan-European public sphere and political culture.

Of course, even if such a project were to succeed, Germans or Poles or Spaniards would have no assurance against being outvoted by a coalition made up of members of other nationalities. It is this possibility, or so it seems, that concerns the Court. The Court appears to hold that if the German (or any other) people or its majority could find itself outvoted, on the European level, with respect to an issue about which it cares deeply, it would suffer an intolerable condition of collective heteronomy and be deprived of the constitutionally guaranteed benefit of democratic rule.⁸¹

To be sure, this worry should not be dismissed out of hand. But it is doubtful whether it suffices to justify the Court's radical conclusions concerning the limits of European integration. To bring out the point, let us focus, for a moment, on the relationship between an individual citizen in a democratic state and the political system of that state. The major function of a democratic system in taking collective decisions, in the domestic setting, is its power to legitimate its outcomes. If I have been given an equal opportunity to participate in and to influence a collective decision, and if my view or my group's view is at least given due consideration by those who disagree, I can no longer claim that the majority's decision subjects me to an intolerable form of heteronomy in a situation where it conflicts with my own view or preference. And yet, the German Constitutional Court seems to want to argue that if exactly the same thing happened to me or members of my group on the European level, I would be subject to an intolerable form of heteronomy. But why should there be intolerable heteronomy in the one case but not in the other?

One possible answer to this question is that there is a considerable danger, in a supranational state, for people to end up in a situation where they are subject to continuing discrimination and effective exclusion from political influence on account of their nationality, even while they enjoy formally equal rights of participation. One

⁸⁰ The same holds for Grimm's arguments in support of the Court's reasoning. See GRIMM, *SOVERÄNITÄT*, *supra* note 68, at 121–123. Grimm confidently announces that democracy is, for the time being, dependent on strong popular sovereignty in a national context. But he seems uninterested in discussing counter examples to this claim. For one particularly interesting case (Canada) see FOSSUM & MENÉNDEZ, *THE CONSTITUTION'S GIFT*, *supra* note 72, at 177–205.

⁸¹ This view is clearly implicit in the Court's claim that the process of European integration can only be constitutional if it does not undermine the particular "identity" of the German people and only if the German Bundestag retains control of a number of key legislative issues. See BVerfG–Lisbon, par. 246–248, 264, 340, 363.

might also imagine scenarios in which the interest of a supranational majority made up of members of various other nationalities is permanently and predictably aligned against an important interest shared by the majority of members of a particular people. If one were to find oneself in one of these situations, the possession of formally equal rights of democratic participation and even the existence of a pan-European public sphere and political culture might not suffice to protect one from continuing domination at the hands of a permanent majority made up of members of other nationalities. And, in that case, the fact that the supranational polity operates under a democratic institutional framework would, as I happily admit, no longer entail that one has reason to consider its laws to be legitimate.⁸²

However, such problems of exclusion and majoritarian domination are in no way peculiar to the context of a supranational European polity. They have frequently occurred and still do occur in the context of a number of democratic states.⁸³ If one holds that these problems, in many instances, can be addressed through adequate constitutional safeguards in a domestic context, there is clearly no *a priori* reason to think that such safeguards could not be successfully applied in a federal Europe. The very multiplicity of Europe, moreover, would seem to make constantly shifting coalitions a likely scenario and, thus, make it highly unlikely that the members of one particular nation would find themselves permanently marginalized on account of their nationality. Therefore, the danger of majoritarian oppression in the European context shows no more than that German citizens ought not to be subjected to a European order in which Germans are likely to be permanently dominated by other nationalities. This conclusion, much like complaints based on the democratic deficit, falls well short of justifying the Court's claim that it is, in principle, unconstitutional to compromise German sovereignty to build a federal Europe.

As I already pointed out, not all situations in which one finds oneself and those who share one's views outvoted by a democratic majority amount to situations of majoritarian oppression. In the domestic context, my group will sometimes have to swallow the fact that the majority may have a different opinion as to how some important problem of policy should be resolved. As long as my group's view is heard, and as long as we have a realistic chance to influence policy and, one day, to find a majority to side with our view, we are routinely called upon to accept the will of the majority as the will of the community of which we are a part. So why would matters automatically have to be different on a European level? Why, in other words, would it automatically be a problem of democratic legitimacy if the majority of Germans found themselves outvoted, with respect to some issue that concerns all Europeans,

⁸² This is why secession, in some instances, may be justified in a multinational state. See ALLEN BUCHANAN, *SECESSION: THE MORALITY OF POLITICAL DIVORCE FROM FORT SUMTER TO LITHUANIA AND QUEBEC* (1991).

⁸³ And not just in multinational states. Even a casual glance at American constitutional jurisprudence, and the debate on the legitimacy of "countermajoritarian" judicial review, should amply suffice to illustrate the point. See, for instance, JOHN HART ELY, *DEMOCRACY AND DISCONTENT: A THEORY OF JUDICIAL REVIEW* (1980); RONALD DWORKIN, *The Moral Reading and the Majoritarian Premise*, in *FREEDOM'S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION* 1–38 (1996).

by a majority of non-German European citizens? To repeat, it would be a problem if there were a problem of majoritarian oppression on account of nationality. However, it is certainly conceivable that there might be no such problem. Presumably, then, it must be the bare fact that the people to whose views I must defer are also Germans in the national context, but non-Germans in the European context, that makes all the difference. However, why should this bare fact matter? That some of those who participate in taking decisions over us are not like us in some respect should be a problem, it seems, only if there is reason to expect that the difference will lead them to disregard systematically our legitimate interests.

Some passages in the *Lisbon* decision suggest an answer to this challenge that puts at least some distance between the Court's argument and the distasteful view that it would be intolerable to have to share decisional authority with foreigners. The Court suggests, at times, that it is essential to democracy that the people to whose decision one must defer are members of one's own nation or share one's own identity because it concurs with Schmitt's view that those who share an antecedent identity will never disagree profoundly over how society should be organized and run. The members of a group that has that degree of internal coherence would have the opportunity to live as they please, without having to restrict each other from living in the way everyone prefers, for as long as the group can determine itself. Nonetheless, the members of the group would lose that opportunity if the group had to share one and the same political system with others who want to live in a different way. On the assumption that European peoples typically exhibit the inner homogeneity that allows for a harmony of social order and individual freedom, it might be better for everyone concerned—in the interest of individual freedom—to retain full collective autonomy on the national level.⁸⁴

The obvious problem with this line of argument is that it is simply false to claim that consensus about the kinds of political decisions that the Constitutional Court thinks should remain on the national level, instead of being delegated to the EU, are uncontroversial on the national level. Disagreement, in Jeremy Waldron's apt words, is an inescapable circumstance of modern liberal politics.⁸⁵ To the extent that issues such as criminal justice, the use of military force, decisions on taxation and public spending, the size of the welfare state, the political role of religion, or the organization and funding of public education are politically controversial in today's Europe, they are not likely to be significantly less controversial on the national than on the European level.⁸⁶ It is precisely for this reason that we rely on a conception of democratic legitimacy of the kind ruled out by strong popular sovereignty even in the domestic context. Not even strictly national democracy can spare us the "torment of heteronomy"⁸⁷ that arises from having to defer, occasionally, to the democratically

⁸⁴ BVerfG–Lisbon, par. 363. For an American defense of this view, see ERIC A. POSNER, *THE PERILS OF GLOBAL LEGALISM* 80–99 (2009).

⁸⁵ See JEREMY WALDRON, *LAW AND DISAGREEMENT* 159–160 (1999).

⁸⁶ BVerfG–Lisbon, par. 249–260.

⁸⁷ The phrase is Hans Kelsen's. See KELSEN, *VOM WESEN UND WERT DER DEMOKRATIE*, *supra* note 3, at 3.

enacted decisions of a majority with which we disagree. If the promise of complete avoidance of such heteronomy cannot be kept on the national level, it makes little sense to reject pan-European democracy on the ground that the promise cannot be kept on the European level.

Finally, even if one were to accept the Court's argument that every well-functioning political community presupposes a shared identity, on some level, one might still argue that there is, in fact, a European political identity, since all European states and peoples are committed to the principles of democracy and to securing the standard set of human rights and rule-of-law protections. When Carl Schmitt described the unamendable constitutional core of the Weimar constitution that had, in his view, been chosen by the German people to give expression to their political identity, he came up with the following list of general principles: the principle of (representative) democracy, the principle of republicanism, the principle of federalism, the principle of liberalism, and the principle of the rule of law.⁸⁸ If the constitutional identity of today's Germany were to be described at the same level of generality and abstraction, it would not differ fundamentally from that of any other member state of the EU.⁸⁹ So whatever the differences in political identity there might be between one European people and another, they appear to be the kind of differences that are grist to the mill of democratic legitimacy in the national context. If the values that we as Europeans already share do not suffice to constitute a common constitutional identity, then the demand for collective autonomy will turn out to be based on little more than the narcissism of small differences.

All told, I do not see how the Court's claim that strong popular sovereignty is essential to democracy can be defended on the basis of a concern to give proper effect to individual democratic rights and to endow democracy with legitimating power. The Court fails to show that it is impossible for democracy to work in a polity not based on strong popular sovereignty. The failure of the Court's attempts to forge a necessary connection between properly functioning democracy and strong popular sovereignty signals a failure to domesticate the Schmittian understanding of strong popular sovereignty. The conception of constituent power that underpins the *Lisbon* decision implicitly conflicts with the idea of democratic legitimacy, much as does Schmitt's own. The Court claims to defend the necessary conditions of legitimate democratic legality. Yet at the end of the day, the Court seems to agree with Schmitt that the constituted democratic process can never have genuine legitimating force, that it can never bridge non-trivial differences in political identity. As a result, the Court's argument does not much advance beyond the blunt and implausible assertion that it must be a violation of the principle of democracy for Germans to have to obey a decision taken by a majority made up of foreigners.

This stance is deeply problematic. The willingness to accord legitimating force to democratic procedure, whether on a national or a supranational level, expresses a

⁸⁸ See SCHMITT, *CONSTITUTIONAL THEORY*, *supra* note 5, at 77–78.

⁸⁹ Hence the possibility of European “constitutional synthesis.” See FOSSUM & MENÉNDEZ, *THE CONSTITUTION'S GIFT*, *supra* note 72, at chapters 3–5.

commitment to the common project of living together under one law, notwithstanding the fact that we differ in our moral opinions and political convictions. It is this commitment that the Court implicitly rejects, both for Europe and, by implication, for its member states. This rejection is not based on the familiar complaint that the EU presently exhibits a remediable democratic deficit. Rather, the Court is ideologically opposed to the cause of European unity because it sees that cause as a threat to national homogeneity, which one must assume it takes to be the basis of justified legality. Such ideological opposition to the cause of European unity, needless to say, will resonate with far too many. However, if my argument is sound, the Court's position should not be dressed up as a concern to preserve the conditions of democratic legitimacy. The view that strong popular sovereignty is essential to democracy is false. Therefore, we should turn our attention back to the constructive task of using the principles and mechanisms provided by national constitutional law to improve Europe's democratic credentials.